No. 2645

United States
Circuit Court of Appeals
For the Ninth Circuit

CRANE CREEK IRRIGATION DISTRICT, a Corporation, and SUNNYSIDE IRRIGATION DISTRICT, a Corporation, Appellants,

vs.

PORTLAND WOOD PIPE COMPANY, a Corporation, et al., Appellees.

Brief of Appellee, Portland Wood Pipe Company.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

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STATEMENT.

The brief of appellants herein sufficiently states the issue as framed by the pleadings. The facts which seem important to us on this appeal are as follows: On August 22, 1910, the Crane Creek Irrigation Land & Power Company, which for convenience we shall call the Crane Creek Company, owned certain water rights and rights of way including a reservoir site on Crane Creek in Washing-

ton County, Idaho, part of one ditch being built (trans., p. 80). The water rights had been acquired from the State of Idaho by Mr. E. D. Ford for the benefit of the Company (Ptffs.' Exhibit 12), and the rights of way were obtained either by deed from the owners of patented lands or by filing maps and applications in the United States Land Office under the Act of January 21, 1895 (28 Stat. L., p. 635), and the amendments thereto. (See Ptffs.' Exhibits 25-33, inclusive, 3, 4, 5, 6 and 13.)

On said date the Crane Creek Company entered into separate contracts with appellants for the sale and conveyance to them of an irrigation system to be constructed on these rights of way. Defendants, Crane Creek and Sunnyside Irrigation Districts' Exhibits "B," contained in the supplemental transcript, is the contract with the Sunnyside District and the contract with the Crane Creek District is identical, except as to the percentage of the system to be conveyed, the amount of bonds to be paid therefor and the amount of the indemnity bond to be provided.

Exhibit "B" provides for a conveyance of 35.26% of the system (Supplemental Trans., p. 9), a consideration of $415,000.00 in bonds at their face value (p. 13), and an indemnity bond of $100,000.00 (p. 23). The contract of the Crane Creek District provided for a 21.75% interest, a consideration of about $240,000.00, and a $75,000.00 indemnity bond. (Tr., p. 125.)

Sometime between the date of these contracts and May 29, 1913, the percentages to be conveyed to the

Districts were increased to 47.2% for the Sunnyside District and 22.4% for the Crane Creek District (Trans., p. 80); and it seems the amount of the consideration was also increased. (See trans., p. 73, and answers of Districts, par. 23, trans., pp. 53 and 68.)

No work was done for over a year after making these contracts, and in September, 1911, the Crane Creek Company made a contract with appellee Maney Brothers & Co. to construct the reservoir contemplated for the project. Considerable work was done under this contract and then after another period of inactivity the Crane Creek Company on April 2, 1913, made a contract with Slick Brothers Construction Company under which the latter agreed to complete the construction of the irrigation system. From time to time after the execution of the contract last mentioned, the Crane Creek Company made certain deeds to the Sunnyside and Crane Creek Districts, respectively, which are abstracted in the transcript (pp. 138-183). These deeds were dated, respectively, May 29th, June 12th, September 1st, November 1st, and December 1st, 1913, and January 2nd, February 2nd, March 2nd, April 1st, May 1st, June 1st, July 1st, and August 15th, 1914.

The two deeds of May 29, 1913, were the only ones that were ever recorded and these were not recorded until November 19, 1914, after appellee Pipe Company had filed suit to foreclose its lien, and long after the claim of lien was placed of record in Washington County. The first four conveyances contain

the following paragraph, which seems wholly unintelligible (trans., p. 141):

> "It is covenanted and agreed that this conveyance, when all the work contemplated in that agreement between the parties hereto, dated August 22nd, 1910, and the extensions and amendments thereof shall have been fully completed and performed, which said dinal conveyance shall contain particular and accurate descriptions including the courses and distances of rights of way for canals, and the canals, dams and other works, and a detail description of the reservoir site."

In the later deeds this paragraph is amplified as follows (Trans., pp. 142-143):

> "It is further covenanted and agreed that this conveyance, when all the work contemplated in that certain agreement between the parties hereto dated August 22nd, 1910, and the extensions and amendments thereof, shall have been fully completed and performed, *shall be delivered up to the party of the first part for cancellation, together with those two certain conveyances dated May 29th*, 1913, *and June 12th*, 1913, *heretofore given by the party of the first part to party of the second part, upon the execution and delivery of a final conveyance* containing particular and accurate descriptions, including courses and distances of the rights of way for canals, and the canals, dams and other works and a detailed description of the reservoir site known as the Crane

> Creek Reservoir, shall be executed and delivered to the party of the second part by party of the first part, it being understood that the partial conveyances shall not be placed of record by party of the second part until the execution of the final conveyance herein. This conveyance being considered merely as a partial conveyance and incomplete except as to the completed portions of the works hereby conveyed." (Our italics.)

The paragraph last quoted is carried through all the deeds which were given, but instead of obtaining a final conveyance from the Company as contemplated in such deeds the Districts recorded the conveyances first given, and the deeds of Aug. 15, 1914, still refer to a final conveyance to be given thereafter.

Appellee Portland Wood Pipe Company on February 9, 1914, entered into two contracts with Slick Brothers Construction Company, the original contractor on the work (ptffs.' Exhibits 1A and 1B, trans., pp. 83-99) for the furnishing of material; and on February 14th appellee began delivering pipe to be used in the construction of this irrigation system, and such pipe was actually used and became a part of the project. At the time these contracts were made, and during the entire period appellee was furnishing this pipe, none of the deeds were of record. There was nothing in the contracts of appellee to lead it to suppose the Districts had any present interest in the system, and these contracts contained the following recital (trans., p. 83):

"Whereas, the said Construction Company is about to install a pipe line for the carrying of water *on the project and lands of the Crane Creek Irrigation Land & Power Company*, at or near Crane Station in the County of Washington, State of Idaho, and desires to purchase from the said Pipe Company approximately twenty-one hundred and seventy-five (2175) feet of twenty (20) inch machine banded wire wound wood stave pipe for the purpose, said pipe to be delivered f. o. b. cars, Crane Station, Idaho, in accordance with the conditions hereinafter named." (Our italics.) (See also trans., p. 89.)

The filing of appellee's lien on May 9, 1914, and within sixty days of the delivery of the last items, the actual furnishing of this pipe by appellee and the balance due it therefor are conceded, but the existence of a mechanic's lien for such material is denied.

Appellants suggest two questions: (1) Whether a material man's lien may be charged against the irrigation system of the Districts; and (2) Whether any part of the said property may be sold at public sale for the satisfaction of the alleged lien?

POINTS AND AUTHORITIES.

If the contracts of August 22, 1910, between the Crane Creek Company and the Irrigation Districts were construction contracts, wholly or in part, they were illegal, ultra vires and void, and the Districts can base no rights upon them.

Idaho Sess. Laws 1909, p. 165, Sec. 1.

Idaho Rev. Codes, Secs. 2396, 2386, 2404.

Hughson v. Crane, 115 Cal. 540, 47 Pac. 120.

Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 Pac. 24.

City of Nampa v. Nampa & Meridian Irr. Dist., 19 Ida. 779, 788, 115 Pac. 979.

The amendment to the irrigation district law, Laws 1913, Chap. 170, p. 542, had no retroactive effect and could not validate these contracts if originally void. These contracts were contracts to convey a completed system at a future time, and neither the completion of the system nor the performance of many of the other covenants and agreements could be specifically enforced in a court of equity.

Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248.

4 Pomeroy, Eq. Jur., Sec. 1405, 6 id. 760.

Texas & Pac. Ry. Co. v. Marshall, 136 U. S. 393, 34 L. Ed. 385, 390.

Farmers' L. & T. Co. v. Burbank P. & W. Co., 196 Fed. 539.

Not even an equitable interest vested in the Districts under these contracts until they were entitled to specific performance, and that could not be until after a final acceptance of the work by them.

Chappell v. McKnight, 108 Ill. 570.

Smith v. Jones (Utah), 60 Pac. 1104.

Bartlesville Oil Co. v. Hill, 30 Okla. 829, 124 Pac. 208.

Younkman v. Hillman, 53 Wash. 66, 102 Pac. 773.

The Districts held the Crane Creek Company out as owner of this property, and are estopped to deny such ownership as against appellee, which furnished material on the strength of such holding out.

Portland v. Inman-Poulson Lbr. Co. (Ore.) 133 Pac. 829, 46 L. R. A. (N. S.) 1211.

Boise City v. Wilkinson, 16 Ida. 150-178, 102 Pac. 148.

Chicago v. Union Stock Yards Co., 164 Ill., 224, 35 L. R. A. 381.

Board, etc., of Arapahoe County v. Denver, 30 Colo. 13, 69 Pac. 586.

Hubbell v. City of South Hutchinson, 64 Kan. 645, 68 Pac. 52.

State of Indiana v. Milk, 11 Fed. 389.

Where the holder of the legal and record title is in possession of property and the vendee, under an unrecorded contract to convey, stands by and allows improvements to be made on the property under contract with such holder of the title, he cannot defeat a mechanic's lien based on such improvements by producing his contract or by obtaining an absolute conveyance from the vendor.

27 Cyc. 59.

Mellor v. Valentine, 3 Colo. 255, 258.

Pickens v. Plattsmouth Investment Co., 37 Neb. 272, 55 N. W. 947.

Lime, etc., Co. v. Pittsman, 161 Ill. App. 228.

The doctrine of relation cannot be invoked in favor of a vendee, under an executory contract of sale, who has obtained a deed so as to defeat the lien of a materialman whose lien has accrued while the vendor was in the apparent ownership and the actual possession of the property, because the doctrine of relation is never applied to the injury of innocent third parties.

1 Devlin, Real Estate, Sec. 264.

Jackson v. Bard, 4 Johns. 230, 4 Am. Dec. 267.

O'Neil v. Wabash Ave. Church, Fed. Cas. No. 10531.

Mechanics' liens in favor of contractors and material men will be upheld against an entire irrigation system.

Bear Lake, etc., Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327.

Continental, etc., Bank v. Corey Bros., 126 C. C. A. 84, 208 Fed. 976.

Nelson-Bennett Co. v. Twin Falls Land & W. Co., 14 Ida. 5, 93 Pac. 789.

Smith v. Faris-Kesl Co., 27 Ida. —, 150 Pac. 25.

Mechanics' liens against quasi public corporations are valid where there has been no compliance with Laws 1909, p. 165.

Smith v. Faris-Kesl Co., *supra.*

Nelson-Bennett Co. v. Twin Falls L. & Water Co., *supra.*

Hill v. Twin Falls Land & Water Co., 22 Ida. 274, 127 Pac. 204.

Pacific Coast Pipe Co. v. Kings Hill Irr. & Power Co., U. S. D. C. Idaho, not reported.

Continental, etc., Bank v. Corey Bros., *supra.*

Irrigation districts are mutual co-operative corporations, organized for the benefit of the lands within their boundaries, and they acquire property subject to all incumbrances which burden it in the hands of their grantors.

Nampa & Meridian Irr. Dist. v. Briggs, 27 Ida. —, 147 Pac. 75.

Knowles v. New Sweden Irr. Dist., 16 Ida. 217, 101 Pac. 81.

City of Nampa v. Nampa & Meridian Irr. Dist., 19 Ida. 779, 787, 115 Pac. 979.

The Crane Creek Irrigation project is subject to sale on foreclosure as an entirety and in one parcel.

Smith v. Faris-Kesl Company, *supra.*

Continental, etc., Bank v. Corey Bros., *supra.*

ARGUMENT.

The Crane Creek Project did not become the property of Appellants until after Appellee's lien had vested.

The principal contention of appellants at the trial herein was that they were public corporations and that the Crane Creek Irrigation Project was dedicated to a public use, and could not be the subject of a mechanic's lien. The trial court declined to determine whether a mechanic's lien on the property of an irrigation district was valid, for two reasons, viz: (1) Because the material furnished by appellee was "for the construction of works belonging to the Power Company and not to the irrigation districts" (trans., p. 188), and the Districts acquired the property burdened with appellee's lien; and (2) Because the Districts had held the Power Company out as owner of the property and themselves as merely purchasers, and could not be permitted to change their position to the hurt of persons who, in good faith, dealt with the Power Company as such owner. The Court intimated, however, that a mechanic's lien on such property might be valid.

But the first question to be determined is: When and under what circumstances the irrigation system became the property of appellants? Their brief does not indicate whether they rely upon the contracts of August 22, 1910, as dedicating this project to a public use, or upon the conveyances beginning with May, 1913, and referred to in our Statement. The first of these possible positions is wholly untenable. Those

contracts did not even pass an equitable interest in the system, for they were merely contracts to convey the system when, or rather as, it should be constructed, and they were not capable of being specifically enforced in equity. It should be borne in mind that at the date of these contracts practically no construction work had been done and the entire project of reservoir, canals, pipe lines, laterals, etc., had to be created, and that it was impossible at that time to actually convey the irrigation system.

An analysis of this contract (Districts' Exhibit "B"), found in the supplemental transcript, shows clearly that there was no intention to convey a present interest, and that such contract was either illegal and void from the beginning, or else was merely a contract to convey an irrigation system to be constructed in the future and which gave no present right or interest in such system. The contract with the Crane Creek District was identical, except as to percentages and consideration. The contract (Exhibit "B"), after certain recitals, provides as follows:

> "*Whereas*, for the consideration hereinafter stated, *the Company hereby agrees to sell and agrees to convey, and the District hereby agrees to purchase and agrees to receive conveyance* of that certain portion of said water rights, water appropriations, and rights of way more particularly hereinafter described, and that portion of such works and irrigation system as constructed, at the times and in the manner hereinafter par-

ticularly set forth; *and the Company, for said consideration, hereby agrees to convey to the District* together with said portion of said water rights, water appropriations and rights of way, that certain portion of the reservoir, dams, canals, pipe lines, flumes, laterals and other works composing such irrigation system completed within the time and in the manner hereinafter particularly set forth." (Our italics.)

Although contained in the recital part of the contract, this paragraph is really the gist of the whole thing. The contract then recites the consideration and proceeds to enumerate numerous specific covenants on the part of both parties.

Paragraph II (p. 8) reads: "The property to be conveyed is (setting out a general description of the property)." How could any language be clearer to show that there was no intention of conveying an interest at the date of the instrument?

Paragraph VII (p. 12) provides for a conveyance of an interest in the reservoir and water rights on the execution of the contract, "excepting the right of possession thereof, which is to be held until final conveyance," and for the conveyance of portions of the system, as shown by monthly estimates, and for a final conveyance upon completion, "*together with the possession thereof;*" and the District agrees to turn over a proportionate amount of District bonds on receipt of these conveyances.

Paragraph XII (p. 14) provides that the District may accept partial conveyances without waiving its

right to object to imperfect work and to require full conveyance on completion; while paragraph XXIII (p. 22) provides for final acceptance before final conveyance.

Paragraph VIII (p. 13) provides for a consideration of $415,000.00 in bonds at their par value (later increased to $565,000.00, trans., p. 73). The consideration agreed to be paid by the Crane Creek District was about $240,000.00. (See answer, p. 53.)

Paragraph XXVII (p. 23) provides for the execution of bonds in the sum of $100,000.00, conditioned for the faithful performance of the terms of the agreement by the Company, for the construction of the works according to plans and specifications, and the completion and conveyance within the time specified, and for the maintenance of the system for a period of five years.

The bond to the Crane Creek District was to be $75,000.00 (Sunnyside Ex. "S," trans., p. 125), but a later agreement provided for a joint bond of $100,000.00.

In addition to the above, the Company makes a number of other covenants and agreements, which we will enumerate briefly. They are: That the system when completed shall conform to certain specifications (pp. 8 and 11); that the reservoir shall have a certain capacity (p. 11); that the Company will furnish material and build the dams, canals, etc. (p. 15); that it will build a telephone line (p. 15); that it will furnish 24,900 acre feet of storage water each season (p. 16); that it will reimburse the Dis-

tricts for interest paid on their bonds before completion (p. 17); that it will pay certain delinquent assessments (p. 21); that it will be responsible for damages arising during construction through accident or negligence (p. 23); and that it will convey an additional percentage of the system on certain conditions (p. 24).

The Districts agree to make delivery of district bonds at certain times to the amount of $415,000.00 (p. 12); not to issue bonds against lands not benefited by the works (p. 17); to repay certain advances to the Company (p. 18); to make certain requirements as to lands annexed to the District (p. 20); and to adopt and enforce certain by-laws in regard to assessments on land held under public land entries (p. 21).

Appellants contend in their brief that the above contract and the similar contract with the Crane Creek District were contracts for construction and conveyance, but we think that they must be considered as contracts for conveyance only, whenever the construction shall have been completed. If they are contracts for construction, wholly or in part, the conclusion necessarily follows that they are illegal and void, and that neither the Districts nor the Crane Creek Company, who participated in the wrongful act of entering into these contracts, can base any rights upon them. Viewed as construction contracts, the bonds provided for in paragraph XXVII are wholly insufficient to comply with Laws 1909, page 165. This statute is quoted at length in appellants'

brief without its application in this particular being noticed. In fact they contend that the bond actually given was in compliance with this statute. The material portion of the statute is as follows:

> "That hereafter any person or persons entering into a formal contract with the State, any county, city, town, school or irrigation district, or any quasi public corporation of the State, for the construction, alteration or repair of any public building, public work, or quasi public work, the contract price of which exceeds the sum of $200.00, shall be required, before commencing such work, to execute the usual penal bond, in a sum *equaling sixty per cent, at least, of the contract price*, to be approved by the officer, board or body authorized to make such contract, *with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract;* * * *." (Our italics.)

The contract price under the Sunnyside contract was $415,000.00, and the Company agreed to furnish a bond of $100,000.00 on this contract, or less than twenty-five per cent when the statute above set forth required sixty per cent. The total price on the two contracts at the time the bond was actually given was conceded to be in the neighborhood of $800,000.00, and yet the Districts accepted a bond for $100,000.00 only. Furthermore, a reference to this bond (Sunnyside Ex. "X") shows that it was not conditioned

as required by the statute, for there is no provision in it that the contractor shall pay all claims of subcontractors, laborers and material men, as required by the statute.

The intent and purpose of this statute was to give such parties a remedy on the bond, and counsel for appellants in their brief have the assurance to suggest that the appellee should have sought its remedy on the bond. We hardly believe this contention could have been seriously made, for nothing can be plainer than that appellee would have no possible chance of recovering on such bond. The statute above referred to is a limitation on the power of irrigation districts to enter into construction contracts, and if this was wholly or in part a construction contract it is clear that it was illegal, ultra vires and void.

Under the Irrigation District law, as it stood at the date of the contracts in question, there was another limitation on the power of such corporations. They were authorized to issue bonds for two purposes, and only two, for the purchase of constructed works, and for sale to the highest bidder after notice.

Section 2396, Idaho Revised Codes, so far as it relates to this question, provides:

> "As soon as practicable after the organization of any such district the board of directors shall, by a resolution entered on its records, formulate a general plan of its proposed operations, in which it shall state what constructed works or other property it proposes to purchase and the

cost of purchasing the same; and further what construction work it proposes to do and how it proposes to raise the funds for carrying out said plan. * * * "

Section 2386, Idaho Revised Codes, so far as material here, provides:

"In case of purchase (of works or property) the bonds of the District hereinafter provided for may be used to their par value in payment."

Section 2404, relative to the disposition of irrigation district bonds, is as follows:

"The board may sell said bonds from time to time, in such quantities as may be necessary and most advantageous, to raise money for the construction of said canals and works, the acquisition of said property and rights, and otherwise to carry out the object and purposes of this title. Before making any sale the board shall, by resolution, declare its intention to sell the specified amount of the bonds, and if said bonds can then be sold at their face value and accrued interest, they may be sold without advertisement, otherwise said resolution shall state the day and hour and place of such sale, and shall cause such resolutions to be entered on the minutes, and notice of sale to be given by publication thereof at least four weeks. * * * At the time appointed, the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder, or may reject all bids * * * provided,

said board shall in no event sell any of the said bonds for less than the par or face value thereof and accrued interest."

These sections were adopted in 1903 from the California irrigation district law, and brought with them the construction they had received from the California courts, particularly in the case of Hughson v. Crane, 115 Cal., 404, 47 Pac., 120, decided in 1896, which decision was reaffirmed in Leeman v. Perris Irrigation District, 140 Cal., 540, 74 Pac., 24. These cases have been fully discussed in the brief of appellants in the case of Maney Brothers & Co. v. Crane Creek Company, Cause No. 2644, and we have nothing to add to that discussion.

The Idaho Supreme Court, in City of Nampa v. Nampa & Meridian Irrigation District, 19 Ida., 779, 788, 115 Pac., 979, gives a similar interpretation to the Idaho statutes, although the above cases are not cited. It follows from these authorities that at the time the contracts of August 22, 1910, were made there were but two ways to dispose of the bonds of an Idaho irrigation district, viz: They might be used at par in payment for property purchased, or they might be sold at par and accrued interest after due notice by publication. They could not be used at that date in payment to contractors for construction work.

It is true that the Idaho Legislature, by Laws 1913, Chap. 170, p. 542, granted to irrigation districts the power to use bonds directly for construction work, in the following language:

"Sec. 2404 A. In lieu of the sale of bonds as provided in Section 2404, and the payment for construction work in cash, as provided in Section 2416 of this title, bonds authorized by the vote of the District for the purpose of acquiring or constructing irrigation works may be issued and delivered by the Board of Directors directly to the contractor in payment for such construction work, * * * "

This act was approved March 12, 1913, and did not go into effect until May 11, 1913, after the Crane Creek Company had made its contract with Slick Brothers Construction Company for the completion of the system, and nearly three years after the contract now under discussion, upon which it could obviously have no effect. Those contracts must be interpreted in accordance with the law as understood when they were made, and the fact that it was necessary to pass a statute giving this right to irrigation districts shows clearly what the law was prior to such enactment.

After the California decisions above cited, it was held in Stowell v. Rialto Irrigation District, 155 Cal., 215, 100 Pac., 248, that an irrigation district had the right to purchase an irrigation system as constructed and pay for it in bonds of the District as portions of the system were conveyed. In comparing the rules laid down in that case with the contracts of August 22, 1910, it will be seen that such contracts are drawn in exact accordance with that decision, and the in-

ference is unavoidable that they were drawn in this way in order to come within such rules. Accordingly these contracts were in fact what they purport to be, namely, contracts to convey in sections, as the same should be completed, an irrigation system to be completed in the future. If they were contracts for construction, wholly or in part, and not contracts of purchase, they were in clear violation of the law as it stood prior to May 11, 1913, and, as shown by the above authorities, were for this reason wholly ultra vires and void, and the Districts who violated the law of their existence in making them cannot claim any rights thereunder.

While holding that these contracts were construction contracts, and not contracts of purchase, might invalidate the bonds issued by the Districts, it could not give the Districts any right against appellee and others who had a right to assume that the Districts were obeying the law. The result is, therefore, that these contracts are either void and of no effect, or else they are contracts for conveyance in the future.

What, then, is the effect of these contracts viewed as contracts to convey in the future? The ditches and other structures were not yet in existence when these contracts were made, and the duty to convey and the right to the conveyances rested upon the performance by the parties of the formidable array of mutual covenants and agreements which we have set out above, and which required a considerable period of time to perform. The most important of these covenants was the agreement to construct the

system, and none of them were of the nature to be specifically enforced.

It is elementary that courts of equity will not decree specific performance of construction contracts, or contracts requiring extended supervision during a period of time.

4 Pomeroy Eq. Jur., Sec. 1405.
6 Pomeroy Eq. Jur., Sec. 760.
Texas & Pac. Ry. Co. v. Marshall, 136 U. S. 393, 34 L. Ed., 385, 390.
Farmers' Loan & T. Co. v. Burbank P. & W. Co., 196 Fed., 539.

In contracts to convey land, the equitable interest of the purchaser depends on whether he has a right to compel specific performance, and whether he is in a position to render full performance of his part. If there are agreements on the part of the vendor which a court of equity cannot enforce specifically, such as an agreement to do construction work, or if the purchaser has to do anything further than pay over a definite sum of money, specific performance of the contract will be refused and there is no equitable title unless and until specific performance can be decreed.

In Chappell v. McKnight, 108 Ill., 570, it is said:

> "A mere contract or covenant to convey at a future time on the purchaser performing certain acts does not create an equitable title. It is but an agreement that may ripen into an equitable title."

In Smith v. Jones (Utah), 60 Pac., 1104, the consideration for the purchase of mining property was to be paid out of mineral to be produced, and it was held that as the production of such mineral could not be compelled, the purchasers did not get an equitable title.

See also Bartlesville Oil Co. v. Hill, 30 Okla., 829, 124 Pac., 208, and Younkman v. Hillman, 53 Wash., 66, 102 Pac., 773, an interesting case.

In analyzing the contract, Exhibit "B," we have shown the mutual obligations of the parties, and it is clear that specific performance could not have been decreed against the Company until the system had been completed and finally accepted by the Irrigation Districts, and accordingly no equitable title could arise until that date.

In any event, these contracts provided for the retention of possession and the right to possession by the Crane Creek Company until final completion, and that Company was in possession of the property with all the indicia of ownership, and appellee is not chargeable with notice of any interest of the Districts in the system.

Section 5110, Idaho Revised Codes, is as follows:

> "Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other

structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent; *and every contractor, sub-contractor, architect, builder or any person having charge of any mining claim, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this chapter*: Provided, That the lessee or lessees of any mining claim shall not be considered as the agent or agents of the owner under the provisions of this chapter." (Our italics.)

Under this section, clearly the Crane Creek Company could charge the property in its possession with mechanics' liens, and appellee's contracts recited that the project belonged to the Crane Creek Company (trans., pp. 83 and 89). Not only was the Crane Creek Company in possession, but its engineers supervised the work and approved the specifications, attached to appellee's contract. Appellee had nothing whatever to do with the Districts. It contracted with Slick Brothers Company, which had contracted with the Crane Creek Company, which in turn had contracted with the Districts; and appellee was under no obligation to go back further than the Crane Creek Company, the party in possession and control of the property. In any event, however, an examination of the contracts would only have revealed that

the Irrigation Districts did not claim any present rights of ownership thereunder. These contracts and the actions of the Districts in connection therewith amounted clearly to a holding out of the Crane Creek Company as owner of the project, and the Districts cannot now defeat the just claims of those who relied on such apparent ownership and furnished the Crane Creek Company material, of which the Districts received the benefit.

In the language of the learned trial Judge (trans., p. 189):

> "Undoubtedly the irrigation districts held out to the world that they were merely the purchasers of this property, and were not engaged in its construction. They cannot now be permitted to change their position, to the hurt of persons who in good faith dealt with the Power Company as the owner of the property."

This statement must clearly control the case if an estoppel is ever possible against the officers of a quasi public corporation, like an irrigation district; and we are satisfied that such Districts have no peculiar privilege in regard to questions of estoppel not shared by States, counties, and other municipalities. The assertion in appellants' brief, at page 26, that "such officers (directors of an irrigation district) cannot by conduct raise an estoppel, equitable or otherwise, which shall foreclose and burden the property of the district," is not supported by any citations of authority, and we submit that no cases can be found refus-

ing to apply the principle of estoppel in such a case as this.

The Districts had power to purchase a completed system from the Crane Creek Company. They held out to the world at large that they were doing just this, and by thus holding out they succeeded in getting the irrigation system constructed. Appellee furnished material on the faith of these representations, and the Districts cannot now be permitted to rejudiate them.

The authorities on estoppel are discussed in appellants' brief in the case of Maney Brothers v. Crane Creek Company et al., Cause No. 2644, and to avoid repetition we will merely enumerate the authorities here which sustain our position and the rule announced in Portland v. Inman-Poulson Lumber Co., (Ore.), 133 Pac., 829, 46 L. R. A. (N. S.), 1211, as follows:

> "There is not one rule of morals for a municipality and another for an individual."

The other cases are:

Boise City v. Wilkinson, 16 Ida., 150-178, 102 Pac., 148.

Chicago v. Union Stock Yards Co., 164 Ill., 224, 35 L. R. A., 381.

Board, etc., of Arapahoe County v. Denver, 30 Colo., 13, 69 Pac., 586.

Hubbell v. City of South Hutchinson, 64 Kan., 645, 68 Pac., 52.

State of Indiana v. Milk, 11 Fed., 389.

We have thus shown that the contracts of August, 1910, gave the Districts no interest or property in the irrigation system, and hence there was nothing to prevent the attaching of appellee's lien in the first instance. Nor can the deeds made to the Districts from time to time confer any rights as against appellee's lien, because none of these deeds were recorded when appellee made its contract, nor during all the time it was furnishing material, nor in fact until long after the claim of lien had been filed and this foreclosure action commenced. Besides, these conveyances show on their face that they were not intended as absolute and final conveyances, and that they were not to be recorded. This last provision was a secret arrangement between the Company and the Districts and the withholding of these instruments from record savors strongly of fraud. It certainly would be a great injustice to appellee if the Districts could now be permitted to rely on these conveyances.

Appellees' lien attached as against the Crane Creek Company, and it cannot be defeated by the conveyances to appellants.

We have shown above that this irrigation system did not become the property of the Irrigation Districts until after the lien of appellee had attached by the furnishing of materials under its contracts, and it follows that there could be no dedication of the property to a public use until after that time. This property being in the possession and control of the

Crane Creek Company, there can be no doubt as to the validity of the lien as against that Company. As the trial court said (trans., p. 188):

> "Very clearly the Power Company acquired title to the property subject to the liens of the workmen who built it and the material men who furnished material for its construction."

The Crane Creek Company had the legal title and possession of the property, and it had a perfect right to charge this property with mechanics' liens, notwithstanding the contracts of August 22, 1910, because these contracts contemplated the construction of the system and there was no provision in them requiring sub-contractors or parties doing work at the request of the Crane Creek Company to waive liens. We thus have a case where the vendor of real property has agreed with the vendee to construct improvements thereon, and both parties must be held to have consented that the property may be subjected to liens for such work.

In 27 Cyc., p. 59, it is said:

> "Where the vendor in an executory contract of sale directly contracts for improvements, he thereby subjects his interest in the land to a mechanic's lien, and where the holder of an unrecorded bond for a conveyance stands by and sees work go on under a contract with the holder of the legal and record title, who is in possession, he cannot afterward defeat a lien by the production of such bond."

In Mellor v. Valentine, 3 Colo., 255, 258, the court states:

"Jones, by his recorded deed, conveyed the fee to Young, and thereby held him out to the world as the owner of the premises sought to be charged with this lien.

"He cannot be permitted to stand by in silence and see the work go on, and afterward defeat the lien, or diminish Young's estate by the production of Young's unrecorded bond to re-convey. 1 Story's Eq. Jur., 385, et seq; Phillips' M. L., Sec. 225; Higgins v. Furgeson, 14 Ill., 269; Donaldson et al. v. Holmes et al., 23 id., 88; Wendall v. Rensselaer, 1 Johns. Ch., 344; Storrs v. Barker, 6 id., 166; Phillips v. Clark, 4 Metc. (Ky.), 348.

"For the purposes of this lien, as against Jones and his grantees, Young must be treated as owner in fee of the property at the date of his contract for repairs.

"The fact that the contract for repairs was with Allen, as well as Young, does not affect the lien.

"If the contract be made with several parties, one of whom is the owner, it is sufficient. Van Court v. Bushnell, 21 Ill., 624; Roach v. Chapin, 27 id., 194.

"The legal effect of section 7 of the Lien Act of 1872 is to give the mechanic a lien from the date the labor was commenced, or the first of the materials furnished.

"The manifest object is to prevent wrong to the mechanic by alienations or incumbrances during the progress of the work. *Subsequent alienations or incumbrances are not prevented, but made subordinate to the right of the mechanics who, at the time, were engaged in working, and continued afterward to work under previous employment by the vendor.* Phillips' M. L., Secs. 228-229; Monroe v. West, 12 Iowa, 119; Miller v. Kaufman et al., 14 Md., 173." (Our italics.)

We think this case is squarely in point here. To the same effect are:

Pickens v. Plattsmouth Investment Co., 37 Neb., 272, 55 N. W., 947.

Lime, etc., Co. v. Pittsman, 161 Ill. App., 228.

It is now well settled that mechanics' liens will arise as against an entire irrigation system by the furnishing of materials or the construction of all, or a part of, such system.

Bear Lake & River Water Works Co. v. Garland, 164 U. S., 1, 41 L. Ed., 327.

Continental, etc., Bank v. Corey Bros., 126 C. C. A., 84, 208 Fed., 976.

Nelson-Bennett Co. v. Twin Falls L. & W. Co., 14 Ida., 5, 93 Pac., 789.

Smith v. Faris-Kesl Co., 27 Ida. —, 150 Pac. 25.

In each of these cases a mechanic's lien was upheld upon the entire irrigation system as against the

company contracting for the work, and its mortgagees. The lien being admittedly valid as against the Crane Creek Company, how can the conveyances made to the Districts operate to discharge such lien, when, by reason of the fact that none of the conveyances were recorded, appellee had no notice of the interests of the Districts? We think that the answer to this question must necessarily be that the lien is not defeated.

In the first place it is by no means clear that a sub-contractor's lien would not prevail against an irrigation district under Section 5111 of the Idaho Revised Codes, quoted in appellants' brief and relied upon by them. This section grants a lien against any "county, city, town, or school district," and was first enacted in Laws of 1893, p. 49. Irrigation Districts were at that time unknown to the statute law of Idaho, the first irrigation district law being some two years later, and the 1893 statute included every known variety of public or quasi public corporation, except the State.

Section 5150 provides:

> "This title establishes the law of this State, respecting the subject to which it relates, and its provisions and all proceedings under it are to be liberally construed with a view to effect their object."

The title referred to is the title on mechanics' liens, which includes Section 5111; and, giving this section even a fair construction, it would, we think, be held

to include irrigation districts. The validity of a lien against a district would, of course, be affected by Laws 1909, p. 165, referred to above. But where there has been no compliance with that statute, as in the present case, the District should not be allowed to obtain the property without seeing that it is paid for. The cases arising upon this statute have upheld mechanics' liens as against irrigation companies operating under the Carey Act, and appellants' attempted explanation of the decisions of the Supreme Court of Idaho, and this Court, on that question is wholly futile.

The lien referred to in the Nelson-Bennett case, quoted at page 19 of appellants' brief as being conferred by the Federal and State statutes, is a lien on the land of the settler for the price of his water right, and is granted to the construction company, and not to the contractor who builds the irrigation system, while the liens foreclosed in those cases were the mechanics' liens of a contractor or sub-contractor who was suing the construction company and seeking to change its interest in the irrigation system.

The most recent case on this subject is Smith v. Faris-Kesl Construction Co., 27 Ida. —, 150 Pac. 25, which contains the following:

> "The said appellant irrigation district assigns as error the action of the court in deciding that the right, title and interest of the Canyon Canal Company, Limited, or of its successor, the said appellant, could be subject to a mechanic's lien. Said appellant earnestly urges that works of a

public character are not subject to the mechanic's lien law, unless the statute shows clearly an intention on the part of the Legislature to include such works. The section of the statute granting a right to a mechanic's lien is 5110, Rev. Codes, and the part necessary to be considered in this connection is as follows:

" 'Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of, any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent. * * *'

"Such act is a part of title 4 of the Revised Codes, and we are admonished by the Legislature in section 5150, which is also a part of said title 4, as follows:

" 'This title established the law of this State, respecting the subject to which it relates, and its provisions and all proceedings under it are to be liberally construed with a view to effect their object.'

"This question was before the court in case of Nelson Bennett Co. v. Twin Falls Land & Water

Co., 14 Idaho 5, 93 Pac. 789; and, while it is contended by counsel for the appellant that the questions here presented were not discussed by counsel or considered by the court in said case, an examination of the opinion of the court in that case indicates to the contrary, for therein it is said:

" 'An examination into the character and extent of the appellants' interest in this property and these works is at once suggested by reason of the contention that it makes to the effect that a mechanic's lien cannot be maintained against this property. The Land & Water Company has argued with much force and earnestness that it has no lienable interest in this property; that the entire property belongs to the State of Idaho and to the United States; that the canal system and the water and the entire works belong to the State of Idaho, and that the lands to be irrigated principally belong to the United States. Appellants contend that the only interest they have is that they may do this work and receive their pay, and that the law does not permit a lien either against the state or the general government.'

"After discussing the laws pertaining to construction companies of the kind under consideration and the rights of such companies and their interests in and to canals and water systems by them constructed, and after considering at some length the contract entered into between said Twin Falls Land & Water Company and the State of Idaho, the court said:

" 'The foregoing are some of the numerous rights and interests we find provided and stipulated for in the contract entered into between the appellant corporation and the state. As to the legal effect of these various stipulations and provisions and the extent of the rights, title and interest acquired by the appellant corporation under them, we express no opinion, nor are we required in this case to determine * * * whether they are sufficient on which to found or rest a mechanic's lien. That the Twin Falls Land & Water Company had, and still has, an interest in this canal system and the lands thereunder and the waters appropriated for their irrigation and reclamation, and that, under the statutes and decisions of this state, such property rights are real estate, there can be no doubt. * * * In this case there is no contention made that the lien claimant can acquire any greater right or interest under its lien than that owned and possessed by the Twin Falls Land & Water Company. * * * Under this enactment of the state Legislature, it is clear to us that the contractors and sub-contractors under a construction company like the appellant would be entitled to avail themselves of the benefit of the lien laws of the state, and that, in case of foreclosure and sale under the lien, they would be entitled to sell all the right, interest and claim of the construction company, and that the purchaser at such foreclosure sale would be subrogated to all the rights, interests and privileges

of the construction company therein. * * * This lien extends only to the interest, claim and right of the Twin Falls Land & Water Company.'

"In this case the lien extends only to such right, title and interest as the Canyon Canal Company, Limited, had in the property at the time the lien of the respondent attached to it."

In the case last cited the project was constructed under the Carey Act, but the system was later conveyed to an irrigation district, and the irrigation district contested the validity of the lien. The court found no difficulty in sustaining the lien as against such district, or in ordering a sale of the property; and since the decision of the Supreme Court, above quoted, execution has actually issued in that case for the sale of the property of the District under the lien foreclosure.

Other cases upholding liens on Carey Act projects are:

Nelson-Bennett Co. v. Twin Falls L. & W. Co., 14 Ida. 5, 93 Pac. 789.

Hill v. Twin Falls Land & Water Co., 22 Ida. 274, 125 Pac. 204.

Pacific Coast Pipe Co. v. Kings Hill Irr. & P. Co. (U. S. District Court, Idaho, Southern Div., decided in December, 1911. Two cases; not reported.)

Continental, etc., Bank v. Corey Bros. Con. Co., 126 C. C. A. 84, 208 Fed. 976.

The effect of the sale under the lien foreclosure in the Pacific Coast Pipe Company case, *supra*, was before this court in Continental, etc., Bank v. Pacific Coast Pipe Company, Cause No. 2452, decided in May, 1915, but no contention was made there that there was any inherent impossibility in selling an irrigation system.

Cases like Pioneer Irrigation District v. Walker, 20 Idaho 605, 119 Pac. 307, cited by appellants, have dealt with irrigation districts in their governmental and not in their proprietary capacity and have no bearing on the question of mechanics' liens against these corporations.

In the recent case of Nampa & Meridian Irrigation District v. Briggs, 27 Ida. —, 147 Pac. 75, at page 82, the Supreme Court says of an irrigation district:

> "It is a mutual co-operative corporation, organized not for profit, engaged in distributing water to its members for use upon lands within its district."

In Knowles v. New Sweden Irr. District, 16 Ida. 217, 225, 101 Pac. 81, the court says:

> "The canal company could not sell any greater title than it possessed and when the irrigation district purchased, *it could neither purchase nor acquire any greater title or interest than its grantor owned and possessed. When it purchased this canal system, it purchased it subject to and burdened with the rights and equities of the appellant's grantor.*" (Our italics.)

The distinction between the proprietary and governmental capacity of an irrigation district is also illustrated by the case of City of Nampa v. Nampa & Meridian Irr. District, 19 Ida. 779, 787, 115 Pac. 979, in the following language:

> "The question arises: Does the defendant, as an irrigation district, stand in any different situation from its predecessor? We think not. An irrigation district is a public *quasi* corporation, organized, however, to conduct a business for the private benefit of the owners of land within its limits. They are the members of the corporation, control its affairs, and they alone are benefited by its operations. It is, in the administration of its business, the owner of its system in a proprietary rather than a public capacity, and must assume and bear the burdens of proprietary ownership. In the case at bar it has simply purchased the system of the Boise City Irrigation & Land Co., and it acquired in the streets of the city of Nampa only such rights as its predecessor had."

These cases, and the case of Smith v. Faris-Kesl Company, *supra*, demonstrate beyond the possibility of a doubt that by transferring property to an irrigation district it is not released from mechanics' liens, mortgages, or other incumbrances upon the interest of the grantor, and, as said by this court in Continental, etc., Bank v. Corey Brothers, *supra*, (208 Fed., at page 983):

"We see no reason why these decisions are not binding on this court."

It is conceded, and has been throughout this case, that the lien of appellee was good as against the Crane Creek Company, and as the Districts acquired the interest of that Company in this property, and no further or greater interest, they cannot escape the incumbrances with which it was burdened in the hands of that Company.

Property Subject to Sale as an Entirety.

In one paragraph of appellants' brief, at page 30, counsel urge that there is no authority given in the statutes relative to execution to sell property of the character of this irrigation system, and in their Assignments of Error they say it cannot be sold as an entirety and in one parcel. These objections do not seem to be urged with great seriousness, and we think they are conclusively met by the cases of Smith v. Faris-Kesl Company and Continental, etc., Bank v. Corey Bros. Company, *supra*. In the former case the trial court found (150 Pac. 28):

"That respondent was entitled to recover from Faris-Kesl Company said sums of money; also that he was entitled to a lien on the property described in the complaint (the entire irrigation system) for the sum of $17,630.00, and that he was entitled to a decree foreclosing the same.* * * Judgment and decree were entered in accordance with the findings of fact and conclusions of law."

This decree was affirmed by the Supreme Court,

plaintiff has levied execution on the property of the irrigation district and is proceeding to sell the system.

In the latter case this Court said (208 Fed. 983):

> "It is urged that the court below erred in decreeing that the irrigation system be sold as a whole and without the right of redemption. *The court below had the power to make the decree, and it was its duty to do so if under existing circumstances the equity of the case required it.* In Pacific Northwest Packing Co. v. Allen, 116 Fed. 312, 54 C. C. A. 648, this court held in effect that, wherever the property and franchise described in a lien is so blended together and reciprocal in its use that to divide it and sell each part separately would destroy or greatly impair the value of the same to the serious detriment of both public and private interests, *the decree should be made for the sale of the same as an entirety and without redemption*, notwithstanding provisions of the state statutes where the property is situated allowing the redemption of real estate. That doctrine is well sustained by the decisions. Farmers' Loan & Trust Co. v. Iowa Water Co. (C. C.), 78 Fed. 881; National Foundry & Pipe Works v. Oconto Water Co. (C. C.), 52 Fed. 43; Hammock v. Loan & Trust Co., 105 U. S. 77, 26 L. Ed. 1111." (Our italics.)

In the Corey Brothers case this Court upheld the lien upon a large Carey Act project. The case went back to the District Court, and the property was ac-

tually sold under the original decree affirmed by this Court.

How the Districts are to discharge this lien is a matter which they, and their learned counsel, should have considered when they were allowing their bonds to be sold at sixty per cent. of their par value and the proceeds of such sale to be paid to the Crane Creek Company and others, without seeing that such proceeds were applied entirely to discharging vested liens upon the property.

We think that it sufficiently appears from the foregoing argument that whatever interest these irrigation districts acquired in this system, either under their contracts with the Crane Creek Company or under the conveyances which were made thereafter and were not recorded, are subject to the lien of appellee, Portland Wood Pipe Company, and that the property is subject to sale as an entirety under the decree entered by the District Court.

Wherefore, appellee respectfully submits that the decree of the District Court foreclosing its lien upon the entire irrigation system of appellants and the Crane Creek Irrigation Land & Power Company, and ordering the sale of such system under foreclosure, should be affirmed.

Respectfully submitted,
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